IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

THE UNITED STATES OF AMERICA, Plaintiff, v. FEDERAL RESOURCES CORPORATION, Defendant.	Case No. 2:CV-11-127-BLW **MEMORANDUM DECISION AND ORDER**

INTRODUCTION

The Court has a number of motions before it that are fully briefed and at issue. For the reasons explained below, the Court will (1) approve the Proposed Consent Decree; (2) grant Coeur d'Alenes Company's motion for summary judgment; (3) deny Federal Resources motion to compel; (4) deem moot Coeur d'Alenes Company's motion for protective order; (5) administratively terminate the motion to dismiss filed by Johnston and Bilbray.

FACTUAL BACKGROUND

The Government originally sued Federal Resources to recoup over $7 million in clean-up costs incurred at three mine sites: (1) Conjecture Mine Site in Bonner County, Idaho; (2) Lakeview Mine Site, also in Bonner County; and (3) Minnie Moore Mine Site in Blaine County. The Government sued Federal Resources as a "Potentially Responsible

Party" (PRP) for those costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERLCA), 42 U.S.C. § 9607.

Each of the three Mine Sites was contaminated with arsenic, lead and other contaminants. The Government incurred the most costs – $4 million – cleaning up the Conjecture Mine Site. The Lakeview Site required over $2 million, and the Minnie Moore Mine Site required over $600,000.

About seven months after filing suit against Federal Resources, the Government filed a separate action against Minnie Moore Resources Inc. (MMRI) to recover the clean-up costs associated with the Minnie Moore Mine Site. *See U.S. v. Minnie Moore, 1:11-CV-501-EJL*. That case was initially assigned to Judge Lodge in this District but later consolidated with the case filed against Federal Resources in this Court.

About two months after filing the *Minnie Moore* case, the Government filed a third separate action against Coeur d'Alenes Company (CDA) to recover the clean-up costs associated with the Conjecture Mine Site. *See U.S. v. Coeur d'Alenes Company, 2:11-CV-633-EJL*. That case was also assigned to Judge Lodge, but was not consolidated with the *Minnie Moore* and *Federal Resources* cases because at the same time the Government filed its complaint against CDA, it also filed a Proposed Consent Decree worked out with CDA to settle the case.

Judge Lodge later approved and entered that Consent Decree, over Federal Resource's objections. Federal Resources has appealed that decision.

In this consolidated case, the Government has now filed a motion seeking Court

approval of a Proposed Consent Decree settling the litigation against MMRI. Federal Resources has objected, and the Court will resolve those objections below.[1]

Another pending motion relates to the contribution action filed in this litigation by Federal Resources against CDA. CDA has filed a motion for summary judgment seeking dismissal of that claim on the ground that the Consent Decree issued by Judge Lodge expressly bars such contribution actions. The Court will resolve that motion below.

Finally, the Court will resolve Federal Resources' motion to compel discovery from CDA and address another motion that has been stayed for the last 7 months.

ANALYSIS

Government's Motion to Approve Proposed Consent Decree

The Government's motion seeks Court approval of a Proposed Consent Decree that settles its litigation against MMRI. Federal Resources objects.

The Minnie Moore Mine Site was used for a mining and milling operation in Blaine County, Idaho. Between 1881 and 1926, the Mine produced silver and lead. The Mine Site was later used to process ore and reprocess tailings from 1949 to 1971.

Federal Resources mined and milled at the site for about a decade. There is no evidence that MMRI ever worked the mine, but it did use the site as a source of gravel. The Government sued MMRI on the ground that they are the present owner of the site.

As a result of the mining and processing activities, the site was allegedly

[1] Pursuant to federal regulations, the Government submitted the Proposed Consent Decree for public comments. The only comments received were from Federal Resources, and they contained the same objections the Court resolves in this decision.

contaminated with, among other things, lead, cadmium, arsenic and manganese. To clean up the site, the Government removed some contaminated soil, graded the remaining contaminated mine tailings into a pile, placed clean soil on the pile, and planted vegetation in that soil to stabilize the waste pile and reduce the amount of contaminants that would leach down through the pile. In doing this work, the Government incurred about $650,000 in costs, and seeks to recoup those costs from MMRI and Federal Resources in this lawsuit.

In talks with the Government, MMRI alleged that it had no insurance coverage and lacked the financial resources to contribute anything toward the clean-up costs incurred by the Government. To test these claims, the Government had Lloyd Oatis – a Financial Analysis for the EPA – review MMRI's financial information. *See Oatis Declaration (Dkt. No. 118-2)* at ¶ 3. After spending 36 years in the private sector as a financial analyst, Oatis has spent the last ten years "focusing on performing ability-to-pay analyses and other business and financial analyses in support of EPA Region 10." *Id*. at ¶ 2. He estimates that he has evaluated the ability-to-pay of more than 150 individuals and companies.

In this case, Oatis evaluated MMRI's financial statements, federal tax returns, and written explanations by the owner. *Id*. at ¶ 4. Because MMRI is privately held, this material was provided to Oatis in confidence. *Id*. Oatis also reviewed publically available material such as property tax assessment records. *Id*. He conducted his analysis in accordance with the EPA's "General Policy on Superfund Ability-to-Pay

Determination." *Id*. at ¶ 9.

His analysis contained two phases. In the first phase, he "assessed MMRI's balance sheet to determine its ability to fund the contribution through liquidation of unnecessary assets and/or incurring additional debt." *Id*. at ¶ 11. In the second phase, he "evaluated MMRI's income and cash flow in order to assess its ability to pay with available future cash flow." *Id.*

Based on this review, Oatis issued the following opinion:

> [M]y expert opinion is that MMRI cannot afford to pay or make a substantive contribution to the approximately $650,000 Site cleanup costs. Further it is my opinion that the contributions assumed and expended by MMRI represent an appropriate resolution of MMRI's ability to pay for Site cleanup. These contributions include having provided clean topsoil and other materials that were utilized in the cleanup and valued by the owner at approximately $75,000, as well as agreeing to institutional controls that will negatively impact the value of MMRI's property at the Site but are otherwise anticipated to provide protection against use of the Site which could otherwise result in harm to public health and the environment.

Id. at ¶ 1. The Government relied on this review in entering into a Consent Decree with MMRI that resolved MMRI's liability without requiring MMRI to contribute anything to the clean-up costs. Instead, MMRI agreed to record an environmental covenant with the state of Idaho to keep the tailings pile fenced and the vegetative cap alive. *See Proposed Consent Decree (Dkt. No.118-3)* at ¶ 8(c), Appendix A. This provision is designed to provide long-term protection for the EPA's cleanup of the Site. If MMRI sells its property at the Site in the next three years, it will pay half of the net sale proceeds to the United States. *Id*. at § VII. The Proposed Consent Decree is expressly conditioned upon

the veracity of the financial information provided to the United States. *Id*. at ¶ 19. Finally, as a result of this settlement, MMRI receives protection from any contribution actions from other PRPs like Federal Resources. *Id*. at ¶ 25.

In evaluating the Proposed Consent Decree, the Court must examine whether it is procedurally and substantively fair, reasonable, in the public interest, and consistent with the polices of CERCLA. *United States v. Aerojet*, 606 F.3d 1142, 1152 (9th Cir. 2010). In this evaluation, the Court gives deference to the Government's evaluation of the proposal. *See United States v. Montrose Chemical Corp. of Cal*., 50 F.3d 741, 746 (9th Cir. 1995). "The true measure of the deference due depends on the persuasive power of the agency's proposal and rationale." *Id.* at 746. The Court must "scrutinize" the settlement process to determine whether the proposed decree is both procedurally and substantially fair but should not second guess the judgment of the parties. *Id.* at 747. Rather, the court is to determine whether the settlement represents a reasonable compromise in light of the fact that one of CERCA's primary goals is encouraging early settlement and minimizing litigation. *See* 42 U.S.C. § 9622(a).

Turning first to a determination of whether the settlement is procedurally fair, the Court "should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." *United States v. Cannons Eng'g Corp*., 899 F.2d 79, 84 (1st Cir. 1990). Procedural fairness is generally met where a proposed settlement is negotiated at arm's length and is conducted forthrightly and in good faith. *Id*. at 86-87.

Federal Resources does not allege that the EPA and MMRI failed to negotiate in

good faith or at arm's length. The settlement set forth in the Proposed Consent Decree – that MMRI make no monetary contribution because it has no ability to pay – is anticipated and provided for in CERCLA. *See* 42 U.S.C. §§ 9622(e)(3)(A) and 9622(f)(6)(B); see also *U.S. v. Hecla Ltd.*, 2011 WL 3962227, at *3 (D. Id. Sept. 8, 2011). In those negotiations, both sides were represented by experienced counsel. Under these circumstances, the Court finds that the Proposed Consent Decree satisfies the requirements of procedural fairness.

Federal Resources argues that the Proposed Consent Decree is substantively unfair because it fails to consider the comparative fault of MMRI. Alternatively, Federal Resources asks that the Court stay any approval of the Proposed Consent Decree until the Court resolves Federal Resource's contribution claims against MMRI.

Typically, "a court must consider the substantive fairness of the consent decree to non-settling PRPs by assessing whether liability has been roughly apportioned based upon 'some acceptable measure of comparative fault.' *Aerojet*, 606 F.3d at 1152 (quoting *Cannons Eng'g Corp*., 899 F.2d at 87). Non-settling PRPs may be held jointly and severally liable for the entire amount of response costs minus the amount of the settlement. *Id*. Thus, MMRI's contribution – or lack thereof – has a direct effect on Federal Resources.

Nevertheless, the Government has the discretion to waive a contribution if its payment would force the PRP to liquidate, go out of business, or sell major assets. This authority was discussed by Judge Lodge of this District in a recent decision:

> However, under the "ability to pay" approach, the parties need not analyze comparative fault in order for the Proposed Consent Decree to be substantively fair. "Because we are confident that Congress intended EPA to have considerable flexibility in negotiating and structuring settlements, we think reviewing courts should permit the agency to depart from rigid adherence to formulate wherever the agency proffers a reasonable good-faith justification for its departure." *Cannons*, 899 F.2d at 88. Similarly, the Government "must be afforded leeway to depart from an apportionment formula to account for factors not amenable to regimented treatment." *U.S. v. Bay Area Battery*, 895 F. Supp. 1524, 1529 (N.D. Fla. 1995)(citing *Cannons*, 899 F.2d at 88). For instance, such leeway is afforded in cases where a PRP's financial health does not make it possible for it to pay its comparative share. In allocating responsibility among PRPs, in such cases, the Government may consider a PRP's financial health, or more precisely, a PRP's "ability to pay." *See* 42 U.S.C. §§ 9622(e)(3)(A), (f)(6)(B), (g)(7). "While certain PRPs have deep pockets and can afford to shoulder their full share of liability for a site's cleanup, other PRPs simply do not have the resources to pay their share." *Bay Area Battery*, 895 F.Supp. at 1529. This "ability to pay" the approach was taken by the Government in arriving at the Proposed Consent Decree submitted in this case. "Ability to pay" settlements seek to avoid forcing businesses into bankruptcy or require them to sell off major assets. *See id.; see also U.S. v. Hecla*, 2011 WL 3962227, *5 (D.Id. 2011). "In this fashion, the [Government] will recover some of its past costs while the PRPs are spared financial ruin." *Id.* at 1529. As EPA itself notes, "ignoring a PRP's ability to pay may, in certain situations, not only impose an undue financial hardship on the PRP but may also reduce or eliminate important benefits that the PRP provides to the community." EPA, *General Policy on Superfund Ability to Pay Determinations*, at 3 (Sept. 30, 1997) ("ATP Guidance"). In such instances, requiring a comparative fault analysis would be fruitless. The company's ability to pay is what it is regardless of its comparative fault. Thus, the fairness analysis turns upon the question of whether the Government appropriately and correctly reached the best resolution of the matter it could under the circumstances being mindful of CERCLA's policies. *See United States v. Brook Village Assocs.*, 2006 WL 3227769, at *11-12 (D.R.I. Nov. 6, 2006). This type of settlement satisfies the goals of CERCLA aimed at promoting early settlement and maximizing recovery costs.

U.S. v. The Coeur d'Alenes Company, 2:CV-11-633-EJL at * 7-9 (D.Id. Nov. 28, 2012).

Federal Resources argues, however, that the Ninth Circuit has decided otherwise in

U.S. v. Montrose Chemical Corp. of California, 50 F.3d 741 (9th Cir. 1995). But that case did not involve a PRP with no ability to pay and thus is not in conflict with Judge Lodge's analysis in any respect.

The Court finds that Judge Lodge's analysis is persuasive. The lack of a comparative fault analysis does not require the Court to reject the Proposed Consent Decree. The Court's review must instead focus on the Government's conclusion that MMRI has no ability to pay. That conclusion is based on the evaluation of Lloyd Oatis, the EPA's financial analyst. As discussed above, he has extensive experience and impressive credentials. There is no evidence to contradict his declaration that he conducted a thorough review of MMRI's financial records to conclude that it had no ability to pay.

Federal Resources takes issue with the provision in the Proposed Consent Decree that bars contribution actions against MMRI. Yet this provision is expressly authorized by CERCLA. 42 U.S.C. § 9613(f)(2) (stating that "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement"). By this provision, "Congress plainly intended non-settlors to have no contribution rights against settlors regarding matters addressed in settlement." *Cannons*, 899 F.2d at 92. Thus, the Court rejects Federal Resources' challenge to the provision in the Proposed Consent Decree barring contribution actions against MMRI for matters addressed in the settlement.

While Federal Resources complains that the Government may get a double recovery in this case, the Proposed Consent Decree contains no such thing, and the Court will ensure that no double recovery is received. Federal Resources also wants credit for MMRI's contribution of topsoil, valued at $75,000. But they have already received "credit" in the sense that MMRI's contribution saved the Government from having to incur that expense. In other words, the expenses that the Government seeks to recoup from Federal Resources in this case are $75,000 less than they otherwise would be, thanks to MMRI's contribution. The Court can find no unfairness here.

After reviewing the Proposed Consent Decree, the Court finds that it is fair, reasonable, in the public interest, and consistent with the polices of CERCLA. *Aerojet*, 606 F.3d at 1152. Accordingly, the Court will grant the EPA's motion to approve the Proposed Consent Decree.

CDA's Motion for Summary Judgment

Third-party defendant CDA has moved for summary judgment on Federal Resources' claim for contribution. As discussed above, Judge Lodge approved and entered the Consent Decree that settles CDA's liability and bars any contribution actions against CDA. That ban on contribution actions is, as discussed above, expressly authorized by CERCLA. *See* 42 U.S.C. § 9613(f)(2).

Federal Resources does not dispute that its contribution claim was barred by Judge Lodge's approval of the Consent Order, but argues instead that the Court should await the outcome of its appeal of that approval. But that is simply an indirect way of staying

Judge Lodge's decision. The Court declines that invitation – Judge Lodge has not stayed the effects of his decision, and Federal Resources cites no authority empowering this Court to do so.

Accordingly, the Court will grant CDA's motion for summary judgment.

Motion to Compel/Motion for Protective Order

Federal Resources propounded interrogatories and requests for production on CDA, prompting CDA to file a motion for protective order. Federal Resources responded by filing a motion to compel the discovery responses.

Since those motions have been filed (1) Judge Lodge has approved and entered the Consent Decree settling the Government's claims against CDA, and (2) this Court has granted summary judgment to CDA dismissing Federal Resources claims for contribution. Because CDA is no longer a party to this litigation, Federal Resources cannot compel it to answer interrogatories. *See 8B Wright, Miller, Marcus, Federal Practice & Procedure* § 2171 (2010) (stating that "interrogatories are limited to parties to the litigation"). Similarly, Federal Resources cannot compel CDA to answer requests for production without a subpoena. *Id*. at § 2209 (stating that "[a]lthough Rule 34 [governing requests for production] may be applied only to a party . . . Rule 45(a)(1)(A)(iii) now authorizes issuance of a subpoena commanding a nonparty 'to produce designated documents, electronically stored information, or tangible things'").

Because there is no evidence that Federal Resources served a subpoena on CDA, the Court will deny this motion to compel and deem the motion for protective order moot.

Motion to Dismiss Filed by Johnston and Bilbray

In June of 2012, the parties stipulated to stay this motion pending further discovery. No response brief has been filed despite the passage of 7 months. Because the Court's docket should reflect only pending motions that are actively under consideration, the Court will administratively terminate this motion without prejudice to the right of the movant to re-file the motion when the discovery is complete.

ORDER

In accordance with the Memorandum Decision set forth above,

NOW THEREFORE IT IS HEREBY ORDERED, that the motion for entry of settlement (docket no. 118) is GRANTED. The Court shall separately sign and docket the Consent Decree.

IT IS FURTHER ORDERED, that the motion for summary judgment (docket entry no. 131) is GRANTED and that the Third-Party Claim of Federal Resources against Coeur d'Alenes Company for contribution is DISMISSED.

IT IS FURTHER ORDERED, that the motion to compel discovery (docket no. 126) is DENIED.

IT IS FURTHER ORDERED, that the motion for protective order (docket no. 101) is DEEMED MOOT.

IT IS FURTHER ORDERED, that the motion to dismiss (docket no. 109) is ADMINISTRATIVELY TERMINATED without prejudice to the right of the movant to re-file the motion.

DATED: **March 6, 2013**

Honorable B. Lynn Winmill
Chief U. S. District Judge